



## *Community Development Department*

### **BISMARCK BOARD OF ADJUSTMENT MEETING AGENDA NOVEMBER 4, 2010**

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Planning Conference Room  
2<sup>nd</sup> Floor

4:00 p.m.

City-County Office Building

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#### **MINUTES**

1. **Minutes.** Consider approval of the minutes of the October 7 and October 21 meetings.

#### **WORKING SESSION**

2. **Special Guest Speaker.** Charlie Whitman, Bismarck City Attorney, will make a brief presentation followed by a question and answer period (*see attached ordinance excerpt*)

#### **ADJOURNMENT**

3. **Adjourn.** The next regular meeting date is scheduled for December 2, 2010.

*Bismarck-Burleigh County Community Development Department*  
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**BISMARCK BOARD OF ADJUSTMENT  
MEETING MINUTES  
OCTOBER 7, 2010**

The Bismarck Board of Adjustment met on October 7, 2010 at 4:00 p.m. in the Tom Baker Meeting Room in the City-County Office Building, 221 North 5<sup>th</sup> Street. Board members present were Chair Michael Marback, Blair Ihmels, Jennifer Clark, and Jeff Ubl.

Members absent were Ken Heier and Dean Conrad.

Staff members present were Ray Ziegler (Building Official), Gregg Greenquist (Planner), and Kim Riepl (Office Assistant).

Others present were Blaine Durick, MedCenter One, Bismarck; Lon Romsaas, Swenson, Hagen & Co.; Bill Wocken, City of Bismarck Administration Department; and Jason Tomanek, City of Bismarck Planning Department.

**MINUTES**

Chair Marback asked for consideration of the August 5, 2010 minutes.

**MOTION:** A motion was made by Mr. Ubl and seconded by Mr. Ihmels to approve the minutes of the August 5, 2010 meeting as presented. With all members voting in favor, the minutes were approved.

**VARIANCE – UNIVERSITY OF NORTH DAKOTA –310 N. 8<sup>TH</sup> STREET**

Chair Marback stated the applicant was requesting a variance to delay the installation of landscaping required in conjunction with parking lot redevelopment at the above location. He asked the representative for UND to provide additional comments to the application as necessary.

Lon Romsaas, of Swenson, Hagen & Co., introduced himself as the representative for UND and MedCenter One and provided the following background information:

- UND is moving to new quarters, and there is an effort to keep UND downtown.
- MedCenter One has agreed to lease to UND the northwest corner of the block
- UND needed to be able to show how they would replace the existing parking that will be lost to the new building, so 8<sup>th</sup> Street was vacated to allow for that.
- The parking on the south half of the block had to be maximized, so the island was reconfigured to fit more parking in.

Mr. Romsaas continued by describing how the project is being done in three phases. The first phase involved the vacation of 8<sup>th</sup> Street, which has been started. The second phase includes the reconstruction of the parking lot on the south side of the lot. These two phases will complete the parking requirements so that the third phase, actual construction of the building, may begin. He further explained that the request for the deferral of the landscaping results from the possibility of a parking ramp being constructed on the south portion of the block. Mr. Romsaas stated that both MedCenter One and UND were in favor of a parking ramp being constructed there, and are

willing to work cooperatively with St. Alexius Medical Center in its design, construction, and use. The ramp would be managed by the City (of Bismarck) and so the City has been approached as to the feasibility of such a ramp. He approached the members of the Board to provide them with a sketch outlining future plans such as skywalk connections, leasing options, etc. He noted that due to the consideration of the parking ramp, there have been several modifications made to allow for its possible accommodation, such as relocation of the oxygen tank and placement of the dumpster. The landscaping becomes an issue as it would have to be torn out should a parking ramp be built. He emphasized that the landscaping on the north end of 8<sup>th</sup> Street and the south end of 8<sup>th</sup> Street will be installed, the only time deferral they are requesting is for the landscaping that would be affected by the construction of a ramp, and that landscaping would be installed once the ramp was built. He added that it is hoped that the work on the foundation for the UND building will begin this fall, which may result in the installation of the landscaping being complete in the year 2012.

Mr. Ubl asked if there was a defined timeline on the completion of the UND building, and if so, what it was. Mr. Romsaas replied that there was an appropriation (Legislative) which will expire on June 30, 2011. If the building is not done by that time, and it is likely it will not be, an extension (of the funding appropriation) would likely be requested.

The question was raised as to the completion date of the building and to which date the landscaping timeframe was tied to: completion of the building, the parking lot, or the approval of the site plan for either.

Jason Tomanek provided some clarification to those questions and others as he referenced 14-03-11 of the City Ordinance dealing with landscaping and screening requirements and also explained the role of the Forestry Department in the enforcement of the landscaping ordinance. He stated that because each phase of this project was submitted as a separate application, each application would be viewed as a separate project, independent of the others, in the interpretation of both the Forestry Department and the Planning Department. Thus, in the case of the landscaping requirement for the parking lot, the timeframe would begin with the completion and implementation of the parking area.

Bill Wocken explained that negotiations had begun with UND for a new clinic site about nine months ago, and after exploring a number of different options, an agreement with MedCenter One had been entered into, with parking being a significant factor in that agreement. The site has been approved for the new UND clinic location, with the State Legislature appropriating approximately \$5.4 million for the project. The appropriation was passed during the last legislative session, and will lapse on June 30, 2011. There has been talk of carrying this over into the new biennium as the project got off to a late start, mostly due to site selection, and the money was not used in the designated time. Mr. Wocken indicated that because the design process is moving forward, it would seem logical that there are some assurances that the funding will be carried over into the new biennium, which action is not without precedent.

Noting he would not recommend abeyance of the requirements of the City Landscaping Ordinance, Mr. Wocken provided the following comments:

- That the landscaping is not being relinquished, only that the completion date of the required landscaping be withheld for a period of three years;
- The variance request for the landscaping is specific to this site only, and requests relief only where the potential ramp may be located;

- There may be a hardship considered in this case due to the physical location of the UND Family Practice Center, the parking lot and the parking ramp, as well as the timing of construction for each of these.

Mr. Wocken suggested that if the variance request was to be granted, that it be done with the time period granted clearly stated and that it applies to this site only.

Mr. Romsaas addressed the Board, noting that the applicant's letter requested the three year time deferral be determined by the date of site plan approval of the project. He provided August 30, 2010 as the date of approval for the parking lot site plan.

Much discussion followed regarding the required amount of area for construction activity, landscaping installation window due to seasons, and timing of construction for each of the project's three phases.

The following findings were provided:

1. The need for a variance is not based on special circumstances or conditions unique to the specific parcel of land involved that are not generally applicable to other properties in this area and within the HM zoning classification.
2. The hardship is not caused by the provisions of the Zoning Ordinance.
3. Strict application of the provisions of the Zoning Ordinance would not deprive the property owner of the reasonable use of the property.
4. The requested variance is the minimum variance that will accomplish the relief sought by the applicant.
5. The granting of the variance is not in harmony with the general purposes and intent of the Zoning Ordinance; however, it is doubtful that it would be injurious to the neighborhood or otherwise detrimental to the public welfare.

**MOTION:** A motion was made by Mr. Ubl to approve the request for the variance to defer the installation of the required landscaping for the area of the parking lot affected by the construction of the UND clinic and specifically the proposed parking ramp for a period of three years, beginning on August 30, 2010 and ending on August 30, 2013, at which time all landscaping requirements shall be met. The motion was seconded by Mr. Ihmels, and with all members voting in favor, the motion was passed.

## **OTHER BUSINESS**

Mr. Ubl mentioned that he'd recently worked in Dickinson and that the City of Dickinson does not use percentages in its calculation of setbacks, although he noted he was dealing primarily with low and medium density multi-family zoned areas.

Mr. Marback asked Mr. Greenquist if a meeting of the committee working on the re-write of the City Ordinance had been scheduled and Mr. Greenquist replied he didn't believe so, but that the Board of Adjustment could offer input to the committee prior to their meeting again.

Mr. Marback thought it best to wait for a draft document from the committee before submitting comments.

**ADJOURNMENT**

There being no further business, Chair Marback declared the meeting of the Bismarck Board of Adjustment adjourned to meet again on September 2, 2010.

Respectfully Submitted,

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Kim Riepl  
Recording Secretary

APPROVED:

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Michael Marback, Chair

**BISMARCK BOARD OF ADJUSTMENT  
MEETING MINUTES  
SPECIAL MEETING, OCTOBER 21, 2010**

The Bismarck Board of Adjustment met on October 21, 2010 at 4:00 p.m. in the Planning Conference Room in the City-County Office Building, 221 North 5<sup>th</sup> Street. Board members present were Chair Michael Marback, Blair Ihmels, Jennifer Clark, Ken Heier, and Jeff Ubl.

Members absent were Dean Conrad.

Staff members present were Ray Ziegler (Building Official), Gregg Greenquist (Planner), and Kim Riepl (Office Assistant).

Others present were Jack Knutson, Bismarck, ND.

**CALL TO ORDER**

Chair Marback called the special meeting of the Board of Adjustment to order at 4:04 pm. He noted that as this was a special meeting of the Board, there would be no prior minutes to consider.

**VARIANCE – JACK KNUTSON – 1009 ASH COULEE PLACE**

Chair Marback stated the applicant was requesting a variance to reduce the combined side yard building setback distance from 18.1-feet to 16.1-feet and to reduce the front yard building setback distance from 25-feet to 20-feet for the purpose of constructing a home at 1009 Ash Coulee Place. He asked Mr. Knutson if there was any information he would like to add to what was in the application.

Mr. Knutson emphasized the factors leading to his application for the variance, stating it was due primarily to the curvature of the street, as the lot is located on a cul-de-sac, and the fact that there is an easement running through the rear of the lot. He elaborated, saying that due to the nature of how the street curves, in order to fit any kind of decent-sized house on the lot, he would need a 20-foot setback on the shortest part of the street and would then have a 35-foot setback on the widest part of the street. He then pointed out that of the 117-feet of rear yard, the pie-shape of the lot distorts what is actually buildable (lot area). He referenced Lot 4, and that it, too, is pie-shaped, which, when the houses are built, will result in it feeling like there is quite a bit of side yard to each lot.

Chair Marback asked if he had considered a lot modification with Lot 4 and Lot 5. Mr. Knutson replied that he had, but was concerned that because Lot 4 only has 35-feet at the front, modifying the lot lines may jeopardize the buildability of Lot 4.

Mr. Heier asked if the easement would be vacated. Mr. Knutson said that he had already applied for the release of the utility easement. He explained that the utility lines are actually buried a little further back than what the plat shows, as Swenson & Hagen had estimated where the toe of the hill would start and stop, which was somewhat

inaccurate. He indicated the yellow highlight which indicated where the utilities actually lay on a map he provided.

Mr. Ihmels asked for clarification as to the front corner being 20-feet from the property line and the side yard, for which Mr. Knutson referenced the map and replied there would be approximately 8-feet on each side yard. Mr. Heier commented that it appeared very little of the house would intrude on the setback and Mr. Knutson responded that only the corner of the garage would do so.

Chair Marback surmised that due to the coulee, almost as much of the lot was not usable as what was usable. Mr. Heier concurred, adding he felt this to be a classic case for a variance due to the terrain, the pie-shaped lot, and the radius cul-de-sac.

Mr. Ihmels asked Mr. Ziegler if the reason for the (required distance of) the side yard setback was for fire purposes and if it was based on percentage. Mr. Ziegler replied that it was for emergency response access, and that normally the minimum is 6-feet but on a pie-shaped lot it is 8-feet.

Mr. Ihmels agreed with Mr. Heiers assessment of the topographical hardship, but he posed two questions to Mr. Knutson. The first was why Swenson & Hagen had not accounted for the space constraints (created by the topography) when designing the plat, and the second question was why could Mr. Knutson not build a house to fit the existing lot? Mr. Knutson responded that to be a good question, as they all knew of the depth he needed, and in retrospect, putting the utilities in the front would have helped to avoid this situation. However, he added that there were several factors preventing the utilities being placed up front, such as the existence of the cul-de-sac and the number of driveways. He noted that it was unfortunate that of sixteen lots, this lot was the only one impacted by the utilities placement. He reiterated that the curve of the street really hurts the useable area of the lot. Mr. Ihmels again asked why he was not able to build a house to fit on the existing buildable lot area. Mr. Knutson stated that because the front of the lot is quite narrow and average in depth, it would be very hard to design a plan to fit the constraints of the lot. He explained the plan for the house on this lot is indicative of everything else that is up there. He provided the example of decreasing the house by five feet, saying it would mean putting on a 28-foot 3-stall garage rather than a 34-foot 3-stall garage.

Ms. Clark asked what the square footage was of the proposed house and Mr. Knutson replied about 1,800 square feet. She asked how that compared to neighboring houses. He said it was extremely typical, with one house about 50-feet less and one about 75-feet bigger. Ms. Clark commented that lot size is determined by the entire lot, not by useable space.

Mr. Ihmels again agreed there to be a hardship with this lot due to topography and size, but added that it was a hardship that was created by design. He expressed the opinion that a home could be built on the lot that would fit, although it may not be appealing to the neighboring lots, as well as to (Mr. Knutson's) benefit. Mr. Knutson agreed, further elaborating by emphasizing the area these lots are in and the views provided. He explained that commensurate to the lot, the house is built, and he does not want to put a 1,400 square foot house on that lot as it would be an injustice.

Mr. Ihmels stated he understood Mr. Knutson's position, but emphasized that the hardship was actually created by the design of the lot. Mr. Knutson acknowledged that if there had been more fill enhancing the toe of the hill back farther, there would have been more depth and it would have certainly helped.

Chair Marback asked Mr. Ziegler if, when determining the lot average, the unusable part of the property was ever taken into consideration, to which Mr. Ziegler said no. The formula that is used is to take the two sides, divide the total by two, and then take that number times 20%.

The following findings were provided:

1. The need for a variance is not based on special circumstances or conditions unique to the specific parcel of land involved that are not generally applicable to other properties in this area and within the RR zoning classification.
2. The hardship is not caused by the provisions of the Zoning Ordinance.
3. Strict application of the provisions of the Zoning Ordinance would not deprive the property owner of the reasonable use of the property.
4. The requested variance is the minimum variance that will accomplish the relief sought by the applicant.
5. The granting of the variance is not in harmony with the general purposes and intent of the Zoning Ordinance; however, it is doubtful that it would be injurious to the neighborhood or otherwise detrimental to the public welfare.

**MOTION:** A motion was made by Mr. Ihmels to approve the request for the variance to reduce the combined side yard setback from 18.1-feet to 16.1 feet and to reduce the front yard setback from 25-feet to 20-feet. The motion was seconded by Ken Heier, and with all voting in favor, the motion was passed.

Mr. Greenquist reminded Mr. Knutson that the utility easement relocation request must be approved by the Bismarck Board of City Commissioners before a building permit can be issued and that item was on their agenda for the October 26<sup>th</sup> meeting.

#### **ADJOURNMENT**

There being no further business, Chair Marback declared the meeting of the Bismarck Board of Adjustment adjourned to meet again at the regularly scheduled meeting on November 4, 2010.

Respectfully Submitted,

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Kim Riepl  
Recording Secretary

APPROVED:

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Michael Marback, Chair



## ***Ordinance Excerpt***

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### CHAPTER 14-06 - BOARD OF ADJUSTMENT

14-06-01. Members. The board of adjustment heretofore created by ordinance shall continue in full force and effect. The board of adjustment shall consist of six (6) members, each to be appointed by the board of city commissioners for a term of three (3) years. The board of adjustment shall have all of the powers and duties imposed upon it by the statutes of the State of North Dakota and the ordinances of the City of Bismarck.  
(Ord. 5667, 05-27-08)

14-06-02. Powers and Duties. The board of adjustment is an administrative board whose powers and duties are limited generally by the laws of the State of North Dakota, particularly by the powers and duties set forth in this section. The board of adjustment shall not have the power to amend this article on zoning, nor to permit nor prohibit any actions which accomplish an amendment of this article on zoning, nor to permit any action nor fail to prohibit any action which would violate this article. However, it is declared the intent of this section that any actions taken by the board of adjustment in full compliance with the provisions of this section shall be deemed to be administrative actions, and shall not be interpreted as unauthorized amendments of the article. The board of adjustment shall have the following powers and duties:

1. Interpretation. On appeal from an order, requirement, determination or provision made by the Building Official or other administrative official, or by request from any official, agency or head of the city, the board of

adjustment shall decide any question involving the interpretation of any provision of this article. The board of adjustment may, in conformity with this article, reverse, affirm, or modify wholly or in part, or render a decision upon any such appeal or request.

2. Variances. On appeal from an order, requirement, decision or determination made by an administrative official, the board of adjustment may vary or adjust the strict application of any of the requirements of this article in the case of an exceptionally irregular, narrow, shallow or steep lot or other exceptional physical or topographical condition, by reason of which the strict application of the provisions of the article would result in unnecessary hardship that would deprive the owner of a reasonable use of the land or building involved, but in no other case.

No adjustment in the strict application of any provisions of this article shall be granted by the board of adjustment unless it finds:

a. That there are special circumstances or conditions, fully described in the findings of the board, applying to the land or buildings for which the variance is sought, which circumstances or conditions are peculiar to such land or building, and do not apply generally to land or buildings in the neighborhood, and have not resulted from any act of the applicant taken subsequent to the adoption of this article, whether in violation of the provisions of the article, or not.

b. That, for reasons fully set forth in the findings of the board, the circumstances or conditions so found are such that the strict application of the provisions of this article would deprive the applicant of the reasonable use of said land or building, and the granting of the variances is necessary for the reasonable use of the land or building, and that the variance as granted by the board is the minimum variance that will accomplish the relief sought by the applicant.

c. That the grant of the variance will be in harmony with the general purposes and intent of this article, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

d. A variance granted under this chapter must be put into use within 24 months of the granting of the variance or it shall lapse and the landowner must re-apply.

3. Conditional Variance. In granting any variance, the board of adjustment shall prescribe any conditions applying thereto that it may deem necessary or desirable to carry out the general purposes of the article or preserve the neighborhood or general welfare from injury.

4. Renewal of Certificate of Occupancy for Nonconforming Use. The board of adjustment shall have the power to renew a certificate of occupancy for nonconforming use in accordance with the provisions of Section 14-03-09 of this article. In granting such renewal, the board of adjustment shall determine that the temporary continuation will not be injurious to the neighborhood, nor to the public welfare, and that there are unusual circumstances or conditions which would create an unnecessary hardship on the applicant for extension, if such extension were refused. The board of adjustment may refuse to grant an extension of the certificate of occupancy for a nonconforming use if application for such extension is received by the board of adjustment less than fifteen (15) days prior to the expiration of the original certificate of occupancy.

5. Renewal of Automatically Revoked Building Permit: Upon appeal by any person holding a building permit automatically revoked by the provisions of Section 14-03-04 of this article, the board of adjustment shall hear and determine whether or not such revoked building permit will be renewed. The board of adjustment shall authorize such renewal only where it specifically finds:

a. Construction of the building has, in fact, been started;

b. Substantial expenditures have been made for such construction; and

c. The plans for building and actual construction of the building are in full compliance with the zoning ordinance in effect at the date of issuance of the building permit, and in full compliance with the building code and any other ordinance of the City of Bismarck.

6. Off-street Parking. The board of adjustment shall, upon application, hear and decide any question relating to the decrease of required off-street parking or off-street loading spaces as set forth in Section 14-03-10 of this article.

7. Airport Zoning. The board of adjustment shall have all powers and duties granted to it by the Bismarck Municipal Airport zoning regulation ordinance.

8. Recommendations to City Planning and Zoning Commission. The board of adjustment is authorized to recommend to the city planning and zoning commission for study or action any changes or amendments to the text or district zoning maps that said board finds desirable. The city planning and zoning commission shall consider such recommendation and may prepare appropriate amendments for the consideration of the board of city commissioners to carry out said recommendation.

9. Miscellaneous Powers and Duties. The board of adjustment shall have such other powers and duties as may be authorized by this article, or any amendment thereto.

10. Rules. The board of adjustment is authorized to establish such rules of procedure, not in conflict with any provisions of the laws of North Dakota, this article, or any other ordinance of the City of Bismarck, as it may deem necessary to carry out the provisions of this article.

(Ord. 4486, 04-27-93; Ord. 5728, 05-26-09)

#### 14-06-03. Appeal Procedure.

1. Appeal - How taken: An appeal to the board of adjustment may be taken by any person, firm, or corporation aggrieved, or by any governmental officer, department, board, or bureau affected by any decision of the Building Official based in whole or in part upon the provisions of this article. Such appeal shall be taken within such time as shall be prescribed by the board of adjustment by general rule, by filing with the Building Official and with the board of adjustment a notice of appeal and specifying the grounds thereof. The Building Official shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal

stays all proceedings in furtherance of the action appealed from unless the Building Official certifies to the board of adjustment, after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application, and notice to the Building Official and on due cause shown.

2. Appeal - Procedure. The board of adjustment shall fix a reasonable time for the hearing of an appeal or for action on any matter upon which it is required to pass under this article and give due notice thereof to interested parties, and make all decisions within a reasonable time. Upon any hearing, any party may appear in person or by agent or attorney. The concurring vote of four members of the board shall be necessary to reverse an order, requirement, decision or determination of the Building Official or other official, or to decide in favor of the applicant any matter upon which it is required to pass under this article. The board shall adopt rules of procedure and shall keep records of applications and action thereon, which shall be a public record.

3. Appeal to the Board of City Commissioners. A decision of the board of adjustment may be appealed to the board of city commissioners by either the aggrieved applicant or by any officer, department, board, or bureau of the city by filing, within fifteen days after notice of the decision, with the city auditor a notice of appeal pursuant to the provisions of section 40-47-11, NDCC. The board of city commissioners shall fix a time, within thirty days, for the hearing of the appeal and shall give due notice of the hearing to the parties. The appeal shall be decided within a reasonable time. Any party may appear in person or by agent or by attorney at the hearing of the board of city commissioners on the appeal. The board of city commissioners may reverse or affirm the decision of the board of adjustment, in whole or in part, or may modify the order, decision or determination appealed.

(Ord. 4486, 04-27-93; Ord. 5728, 05-26-09)